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Northwest Carriers, Inc. And State Insurance Fund v. Industrial Commission of Utah Second Injury Fund, And Herbert Merz : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

NORTHWEST CARRIERS, INC. and :
STATE INSURANCE FUND,

Plaintiffs,

-vs-

INDUSTRIAL COMMISSION OF
UTAH SECOND INJURY FUND, and :
HERBERT MERZ,

Defendants.

MELVIN E. INGERSOLL and
STATE INSURANCE FUND,

Plaintiffs,

-vs-

RICHARD M. CAMP, SECOND
INDURY FUND and INDUSTRIAL
COMMISSION OF UTAH,

Defendants.

DEED OF CONFESSION
AND FORECLOSURE

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IN THE SUPREME COURT
OF THE STATE OF UTAH

NORTHWEST CARRIERS, INC. and :
STATE INSURANCE FUND, :

Plaintiffs, :

-vs-

Case No. 17170

INDUSTRIAL COMMISSION OF :
UTAH SECOND INJURY FUND, and :
HERBERT MERZ, :

Defendants. :

MELVIN E. INGERSOLL and :
STATE INSURANCE FUND, :

Plaintiffs, :

-vs-

Case No. 17245

RICHARD M. CAMP, SECOND :
INJURY FUND and INDUSTRIAL :
COMMISSION OF UTAH, :

Defendants. :

BRIEF OF DEFENDANT'S SECOND INJURY FUND
AND INDUSTRIAL COMMISSION OF UTAH

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COMMISSION OF UTAH, :

Defendants. :

BRIEF OF DEFENDANT'S SECOND INJURY FUND
AND INDUSTRIAL COMMISSION OF UTAH

NATURE OF THE CASE

These two cases involve the interpretation of Section 35-1-69, Utah Code Ann. (1953), as it pertains to reimbursement to the insurance carriers from the Second Injury Fund on factors such as the employees' age, education, intelligence and job availability.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The Commission apportioned compensation and medical expenses in proportion to the disability caused by the industrial accident and the proportion of disability under Section 35-1-69 Utah Code Ann. (1953), which was pre-existing.

RELIEF SOUGHT ON APPEAL

Defendants on appeal, Industrial Commission of Utah and Second Injury Fund seek an affirmance of the rulings of the Industrial Commission.

STATEMENT OF FACTS

Re: Northwest Carriers, Inc. (Merz)

Herbert Merz sustained an industrial injury to his back on August 11, 1974 while employed by Northwest Carriers, Inc.

A medical panel report found Merz to have a 55 percent impairment with 40 percent of that impairment due to the industrial injury of August 11, 1974, and 15 percent impairment as the result of a prior industrial accident. The prior injury was incurred in 1963 while working for the Utah Highway Department and compensation and medical expenses were paid.

The plaintiff, State Insurance Fund, is now asking reimbursement of 60 percent of compensation and medicals instead of the 15 percent awarded by the Industrial Commission.

Re: Melvin E. Ingersoll (Camp)

Mr. Camp incurred an industrial accident on August 6, 1974. He was found to have a 68 percent loss of bodily function with three percent of the 68 percent being pre-existing psychiatric problems. The State Insurance Fund is asking reimbursement of

32 percent of advances for medical expenses and temporary total compensation instead of the three percent awarded by the Industrial Commission.

ARGUMENT

AGE, EDUCATION, INTELLIGENCE, JOB AVAILABILITY, ETC. ARE NOT FACTORS IN AWARDING MEDICAL AND TEMPORARY TOTAL DISABILITY PAYMENTS TO BE PAID BY SECOND INJURY FUND.

Utah Code Ann. (1953), Section 35-1-69, provides that the second injury "special fund" shall be applicable to an injured worker who has:

. . . previously incurred a permanent incapacity by accidental injury, disease, or congenital causes . . . which results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity.

Plaintiffs assert that a number of pre-existing problems of the applicants in both cases have resulted in substantially greater incapacity than would have occurred absent those problems. Among the pre-existing conditions cited by the plaintiffs, are age, education, intelligence quotient, job availability, personality, problems (troubled childhood, unsuccessful marriages, inability to undergo rehabilitation), lack of skills, alcoholism and drug abuse, and a previous back injury. The prior back injury noted by the plaintiffs is a previously incurred "accidental injury" within the meaning of Utah Code Ann. (1953), Section 35-1-69, and if it has resulted in a substantially greater injury than would have resulted without it, the "special fund" will be liable for the related medical care and compensation.

In the Camp case, the plaintiffs cite a pre-existing factor to be the applicant's having obtained only a fourth grade education and his sole skill being that of a journeyman bricklayer. The limited education and skills of the applicant do not qualify as "accidental injuries, disease, or congenital causes" within the meaning of Utah Code Ann. (1953), Section 35-1-69. They are pre-existing conditions that are part of the individual.

In Morello v. Baldanza Bakery, Inc., 105 N.J., supra, 523 A.2d 583 (1969), the New Jersey court dealt with the issue of whether its "special fund" was liable to the petitioner for compensation due to his injured left arm and hand because he was unable to speak, understand or write English. The court held that it could discern no legislative intent to make the special fund liable for payment of part of an employee's total disability where the pre-existing factor was solely the poor literacy or low intelligence quotient of the injured employee. Similarly, in the instant cases, Utah Code Ann. (1953), Section 35-1-69, demonstrates no legislative intent to hold Utah's "special fund" liable where the factor at issue is the poor education and lack of skill of the injured worker.

Plaintiffs cite the age of applicants as being another factor substantially increasing incapacity. Obviously, age is not an "accidental injury, disease, or congenital cause" such that Utah's special fund will be liable to the applicant for compensation.

The Kentucky court in Young v. Scotia Coal Co., Ky., 461 S.W. 2d 796 (1971) dealt with the issue of whether a pre-existing

condition attributable to normal aging was a disease condition within the meaning of its special fund provision. The court held that aging was not a disease. In the present cases, plaintiffs do not assert that the applicants' age has resulted in any degenerative condition. They allege that age alone is a pre-existing condition. Surely Utah's legislature did not intend that the "special fund" be liable for the natural aging process and normal wear and tear on the human body.

In Larson's Workman Compensation he designates a heading as:

AGE, Effects of: not a pre-existing condition 59.20. This is explained in the text as follows:

"to be apportionable, then, an impairment must have been independently producing some degree of disability before the accident, and must continue to operate as a source of disability after the accident."
P. 10-285, Vol. 2

There is no evidence in this case at all that applicant's age, education and experience were independently producing some degree of disability before the accident.

Plaintiffs refer to a number of the applicants' personal problems which predated the industrial accident and argue that the "special fund" must compensate applicant for his "unemployability" as caused by those personal troubles.

In the Camp case, plaintiffs seek to place liability upon the "special fund" based upon the employee's inability to complete rehabilitation training, his unsuccessful attempts at marriage and his troubled childhood. Plaintiff's can point to no direct

relationship between these alleged previous conditions and the applicant's industrial back injury unless they allege that the combination of his personality problems and his accident have damaged his employability. A history of emotional instability, coupled with an industrial accident is not a disease condition within the meaning of Utah Code Ann. (1953), Section 35-1-69. The fact that such emotional problems interfere with the applicant's ability to compete on the job market is not sufficient cause to incur the liability of Utah's "special fund."

The plaintiff's rely upon recent cases that are not applicable. McPhie v. Industrial Commission, 551 P.2d 504 and 567 P.2d 153 is cited as the authority for their position.

McPhie was declared by the medical panel to be 100 percent permanently and totally disabled. Age, education and work availability were not an element in that case or any of the other cases cited by the State Insurance Fund.

Whenever "remainder" is used in the cases cited there was no reference to the remainder being wholly or partially the result of age, education or work availability. McPhie does rely on the purpose of the Second Injury Fund:

One of the purposes of the statute above (35-1-69) referred to was to encourage employers to hire handicapped workers by requiring the Special Fund to assume responsibility should the employee receive an industrial injury from which he might become totally disabled from further employment. The second purpose was to establish a broader base of responsibility for pre-existing conditions.

If one of the purposes was to encourage the hiring

of the handicapped, then we must look to the definition of handicapped for enlightenment. If the Second Injury Fund is liable it also becomes necessary to define age, education, and experience as a prior handicap. To so define and equate in my opinion is a stretch of the imagination and a stretch way beyond the stated purpose.

A handicapped person is defined by the Federal Government in implementing Section 504 of the Rehabilitation Act of 1973 as:

Any person who (a) has a physical or mental impairment which substantially limits one or more of such persons major life activities, (b) has a record of such impairment, or (c) is regarded as having such impairment.

The Administrative Law Judge outlined in his Order of the Merz case (R 257) the difference between impairment and disability as it applies to these cases. It is important that the statute, sec. 69, speaks of impairment and not of disability. The Judge goes on to say:

The State Insurance Fund contends that it should be entitled to reimbursement for 60 percent of all amounts paid during the last six years by way of weekly compensation benefits and medical expenses. Such a conclusion does not necessarily follow. This throws onto the Second Injury Fund all of the consequence of the applicant's disability regardless of the relative contribution of the physical impairment sustained by the applicant in the industrial injury contrasted to his pre-existing impairment. The only factors which have resulted in the applicant no longer being reasonably employable are the fact that he sustained a 40 percent permanent physical impairment as the result of the industrial accident and he has become six years older which is the primary reason for his not being a good candidate for rehabilitation. Were the

applicant younger, he almost certainly would be a candidate for rehabilitation. His age, therefore, is a dominant factor in his being disabled. In fact, pre-existing conditions only contribute 15 percent to the applicant's overall impairment or disability, all other factors having occurred since the time of the industrial accident. It follows, therefore, that the State Insurance Fund should be reimbursed for 15 percent of the expense it has incurred out of the Second Injury Fund rather than the 60 percent requested.

The Camp case is a good illustration of how extreme an example can be made to shift a responsibility to the Second Injury Fund. There is only a three percent pre-existing impairment and a 65 percent impairment due to the industrial accident. One has to ignore reality and the years of prior decisions (until Ortega) to believe that 68 percent is "substantially greater" than 65 percent. The State Insurance Fund is now asking a 32 percent reimbursement instead of the three percent pre-existing.

Section 69 was intended to compensate prior handicaps. Age, education, experience and employment opportunities are similar to incapacities or handicaps intended to be compensated for under that section.

CONCLUSION

The Industrial Commission made awards in both these cases consistent with the findings. Any increased responsibility placed upon the Second Injury Fund is without legislative intent and contrary to all past practices of the Commission.

DATED this 22nd day of April, 1981

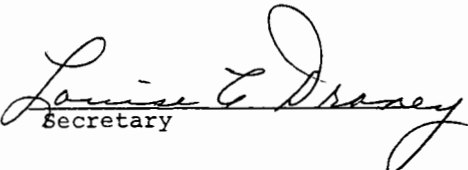


M A I L I N G C E R T I F I C A T E

I hereby certify that two copies of the foregoing BRIEF
were mailed, postage prepaid this 23rd day of April, 1981, to
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